No. 89

In the Supreme Court of the United States

OCTOBER TERM, 1952

AUTOMATIC CANTEEN COMPANY OF AMERICA,
PETITIONER

v.

FEDERAL TRADE COMMISSION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION

INDEX

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OPINIONS BELOW

The opinion of the Court of Appeals (R. 516), affirming and granting enforcement of the Commission's order, is reported at 194 F. 2d 433. The opinion of that court denying petitioner's application for rehearing and motion for leave to adduce additional evidence (R. 536) is reported at 194 F. 2d 439.

JURISDICTION

The final decree of the Court of Appeals was entered on March 10, 1952 (R. 538). The petition for writ of certiorari was filed on May 29,

1952, and granted on October 13, 1952 (R. 544). The jurisdiction of this Court is conferred by 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

The following questions are in controversy:

1. Whether the Commission, in a proceeding under Section 2 (f) of the Clayton Act, must prove that the buyer "knew" that discriminatory prices knowingly induced and received were not justified by differences in cost of manufacture, sale, or delivery.

2. Whether petitioner, on this record, can validly assert that the Act, as construed below, denies it due process, either as indulging unconstitutional presumptions or as imposing an impossible burden of proof.

3. Whether the court below erred in denying petitioner's motion to adduce additional evidence.

On a fourth question, namely, whether the court erred in granting the Commission's cross-petition for enforcement of its order, respondent concedes that this Court's decision in *Federal Trade Commission* v. *Ruberoid Co.*, 343 U. S. 470, requires reversal of the decision below insofar as it granted such enforcement. Hence that question is not in controversy here.

STATUTE INVOLVED

Section 2 of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U. S. C. 13, provides in pertinent part:

(a) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, * * * and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: * * * *And provided further*, That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescense of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

(b) Upon proof being made, at any hear-

ing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however,* That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

* * * * *

(f) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section.

STATEMENT

PROCEEDINGS BELOW

On March 19, 1943, the Federal Trade Commission issued its complaint (R. 3–11) charging petitioner with violation of Sections 2 (f) and 3 of the Clayton Act. It alleged that petitioner was engaged in the business of leasing automatic vending machines and in the purchase of candy

bars, chewing gum, nuts, and other confectionery products for resale to its distributors, who in turn offered them to the public through the vending machines leased from petitioner. Count II—which presents the only questions now at issue—charged that petitioner in the purchase of confection and nut products had been and was knowingly inducing and receiving from various sellers, discriminations in price in violation of Section 2 (f) of the Clayton Act.[1] Petitioner's answer (R. 12–14) was a general denial.

Extensive evidence was taken in support of the charges of the complaint. When the Commission completed its case-in-chief, petitioner filed a motion (R. 14–15) to dismiss Count II of the complaint for the reason that:

> Counsel for the Commission have not proved a prima facie case in violation of the Robinson-Patman Act in that they have not proved, nor have they attempted to prove, that respondent [petitioner], who was the purchaser, "knowingly induced or received" price differentials which made more "than due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities" in which the commodities involved were to such purchaser sold or delivered.

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[1] Petitioner does not here challenge the order insofar as it relates to violation of Section 3, charged in Count I. (Pet. Br., p. 5.)

Upon a review of the evidence and consideration of briefs and oral argument the Commission denied this motion (R. 15–17), holding that a *prima facie* case had been established and that the question whether the price discriminations were justified by costs "need not at this stage of the proceeding be decided" (R. 17).

Petitioner elected to stand on its motion. It made no attempt to bring forward any evidence. Accordingly, the proceedings were terminated (R. 463–467), and after the filing of the trial examiner's recommended decision the matter came before the Commission for final disposition. The Commission made its findings as to the facts (R. 473–493), concluded (R. 493–494) that petitioner had violated Section 2 (f) as charged, and issued its order and opinion (R. 494–504).

Upon review the court below affirmed and granted enforcement of the Commission's order (R. 516–524). The court held, contrary to petitioner's contention, that proof of lack of cost justification and the buyer's knowledge thereof was not part of the Commission's case under Section 2 (f), but was a matter of defense. Thereafter the court (R. 536–537) denied a petition for rehearing on the ground that it presented no questions not fully considered in the original review; and also denied a motion for leave to adduce additional evidence on the ground that petitioner had no right to a "new hearing on a new theory of defense."

THE COMMISSION'S FINDINGS

The findings as to the facts made by the Commission are not challenged here. Those especially significant to the issues before this Court may be summarized as follows:

Petitioner is engaged in leasing automatic coin-operated vending machines designed to dispense candy bars, chewing gum, nuts, and other confectionery products, and in the purchase of such confectionery products for resale, generally as a wholesaler, to lessees of its machines (R. 475). As of January 11, 1946, petitioner owned approximately 230,150 vending machines (R. 477) which it leased to some 83 distributors who operated the machines in 112 separate territories located in 33 states and in the District of Columbia (R. 475). Since its incorporation in 1931, and particularly since 1936, petitioner has enjoyed a rapid growth in business and attained a dominant position in the sale of confectionery products through vending machines. This expansion resulted primarily from the exclusive-dealing contracts which it used and the lower prices which it obtained on the products it purchased for resale (R. 490). Its sales increased from $1,937,117 in 1936 to $14,706,508 in 1942 (R. 491).

Petitioner knowingly induced and knowingly received from some 80 of the 115 suppliers from whom it purchased candy, gum, nuts, and other confectionery products prices which were lower

by from 1.2% to about 33% than prices paid by its competitors to the same suppliers for products of like grade and quality (R. 484). These differentials varied, within the range stated, among sellers and among products (R. 485).

One of the principal items purchased by petitioner was candy bars (R. 491) designed to retail at 5 cents each (R. 484). These candy bars were generally packaged by the producers thereof in cartons of 24, 60, and 100 bars. The standard or usual price[2] to competitors of petitioner from 1936 to 1942 was 64 cents for the 24-count package, $1.50 for the 60-count, and $2.50 for the 100-count package (R. 484, 485).[3] During this same period petitioner paid from $1.95 to $2.25 for 100-count packages in which it principally purchased such candy bars. In 1942 the standard or usual price for candy bars in 100-count packages was increased to $2.65 but petitioner only

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[2] A witness described the character of this standard price thus (R. 58):

> I would not say it was a custom [64 cents for 24-count], but when you are manufacturing an item that retails at a certain price, you have to make a spread from the manufacturer to the retailer for the various individuals that are involved in handling that to the trade, and at that particular point, sixty-four cents was recognized as the logical price to be charged for standard five cent items.

[3] Many suppliers refused to sell their candy bars to jobbers and wholesalers in 100-count cartons (R. 75, 239, 271, 273, 293, 314).

paid from $2.00 to $2.62 for such packages (R. 485).

The gross profits obtained by petitioner consisted almost entirely of the preferential discounts in price which it exacted. For example, from 1937 to 1945, inclusive, petitioner purchased from the Wrigley company $8,823,728 worth of gum at a price of 38 cents per 100 sticks. Other purchasers competing with petitioner or its distributors paid Wrigley 55 cents per 100 sticks, or approximately $3,947,471 more than petitioners paid for the same quantity of gum. This difference in price amounted to approximately 96 percent of the $4,091,386 gross profit realized by petitioner on the resale of such gum for the period mentioned (R. 486–487).

After finding in considerable detail that the effect of the various discriminations in price obtained by petitioner "has been and may be" injurious to competition and promotive of monopoly (R. 488–490), the Commission found that petitioner used various methods in actively soliciting and inducing the discriminatory prices it received (R. 491–493). One method was to inform prospective suppliers of the prices and terms of sale which would be acceptable to petitioner without consideration or inquiry as to whether such prices could be justified on a cost basis (R. 492). At times petitioner refused to buy unless the price to it was reduced below the

price at which the particular supplier sold like merchandise to others[4] (R. 492–493). In other instances, petitioner sought to explain to the prospective supplier that certain elements of the supplier's cost could be eliminated which would, in petitioner's opinion, justify a lower price than what petitioner considered to be a standard price. Thus in letters to The Curtiss Candy Company on November 15, 1939, and to W. F. Schrafft & Sons Corporation on February 15, 1937, petitioner summarized (R. 493) alleged savings to these companies as follows:[5]

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[4] See for example the following testimony of suppliers concerning negotiations with petitioner: "[Petitioner's representative stated that our price] didn't fit into his picture, it was too high for him * * *" (R. 214).

"He told us very frankly that our price would not fit into his picture because it was too high" (R. 216). The price quoted was "the same price as we would quote to everybody" (R. 215).

"They were seeking a lower price on our regular pack, 24-count pack price" (R. 228).

"* * * If we expected to do business with him, we would have to give them a better price than our established 24-count price" (R. 231).

(See also R. 196, 277, 313.)

[5] Though not included in the findings, the reply by Schrafft (R. 491) is illuminating. It said in part:

> "* * * Our freight costs are probably not over half of the figure you specified. Our sales cost and carton cost are much lower. We do not offer free deals and our sampling expense is very moderate.

Alleged Savings	Curtiss Co.	Schrafft Corp.
(1) Freight savings of	6%	5% to 7%
(2) Sales cost savings of	7%	7%
(3) 24-count cartons savings of	5%	5%
(4) Return and allowances savings of	1%	1% to 2%
(5) Free deals and samples savings of	6%	2% to X%
(6) Shipping containers savings of		1% to 2%
Total deductions	27%	21% to 28%

Petitioner knew that many of the prices which it induced and received were lower than prices paid by its competitors to the same sellers for like goods. This knowledge was based on common trade information that the items purchased were standard-price items and that sales by most suppliers were based on that standard. In some instances petitioner was directly informed by suppliers that the prices it received were lower than those given to other customers (R. 491). Numerous suppliers so advised petitioner (R. 491, 492). The Town Talk Company did so by letter (R. 492) saying:

> At all times we have made sales to your Company at substantially lower prices than we made to other Companies and also at substantially lower prices than our ceiling price.[6]

[6] There are many instances of specific statements to petitioner on this point in the record, for example:

The Mason Au & Magenheimer Confectionery Mfg. Co., advised (R. 421) on April 19, 1939—

> Our price to you on our candies which you use is $1.95 for 100 count cases and this figured out in 24 count b[illegible]

The Commission's findings neither summarize all of the evidence which supports them nor attempt to characterize the purchasing practices of petitioner. The record in this case discloses the persistent and continuous activities of a large buyer in wheedling and even coercing suppliers into granting it discriminatory prices. The methods used varied to meet particular situations but the goal remained the same. Thus, the witness Melsfer testified that he could not get peti-

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brings the price down to 46½c per box, which you can see is a decidedly lower price than we get from our regular jobbing trade. Our price to you is so low that as it stands, it is just about at the break-even point, but we like the business on account of the distribution and the prestige that we get from such business from you * * *

The Planters Nut & Chocolate Co., on December 5, 1941 (R. 427) after quoting petitioner a price of $2.30, stated—

> As you may know, our regular price for this same merchandise that you are buying is $2.50 per carton of 100 packages, full freight allowed.

The National Licorice Company wrote on September 17, 1941 (R. 425) advising—

> Although we are increasing the price of twenty-four count NIBS one cent a box on September 22, as you were informed in our letter of September 12 we are maintaining the price of NIBS in the one hundred count despite the fact that our manufacturing costs have advanced considerably. The 2% cash discount represents most of our profit in this package.

It is also clear that petitioner had full knowledge in instances where lower prices were purportedly based upon cost savings, for a buyer cannot negotiate with a seller for a lower price based on cost savings in dealing with him, as compared with other customers of the seller, without knowing that he is seeking a different price than that charged others. Petitioner concedes this (Pet. Br. p. 29).

tioner's officials to name a price acceptable to petitioner, because they stated: "* * * We don't dictate any price because we don't want any blood on our hands." (R. 310.) Yet other suppliers somewhat differently situated testified they were told what the price should be.[7] Thus, the witness Schmidt (R. 236) stated:

> * * * As far as I know in all my negotiations with them at the start there was the price.

[Petitioner's attitude was:]

> If you make goods for us we can give you some nice business and we needed business.

Petitioner asked large suppliers like Curtiss and Schrafft for alleged cost savings in the form of reductions in their regular prices. One variation of the "cost savings" theme is exemplified by the testimony of Walter Mann of the Wilbur-Suchard Chocolate Company. In this instance petitioner was quoted the standard and established price. In response, petitioner outlined the reasons why such a price would not be acceptable and made it clear that this company could not expect to obtain that price because its product was not as well known as similar products and that it would have to sell at a lower price than "competitive bars that were more in demand

[7] For other examples see R. 69, 70, 105, 254, 279, 345, 372–373.

would sell for" (R. 148). This seller was also advised that it could not expect to sell to petitioner at the price it was receiving from some other class of customers. Having established these factors as a base, the petitioner then continued the negotiations with a discussion of cost savings, but the alleged savings were to be applied not to the standard price but to a price decided upon by petitioner without reference to cost factors. (R. 147–153, 165, 166.)

SUMMARY OF ARGUMENT

I

Section 2 (f), making it unlawful for a buyer knowingly to induce or receive a "discrimination in price which is prohibited by this section" refers to a discrimination in price prohibited by Section 2 (a). This Court has held that the elements of an unlawful discrimination in price necessary to support an order under Section 2 (a) are: (1) a difference in price; (2) on goods of like grade and quality; (3) the effect of which may be injurious to competition. *Federal Trade Commission* v. *Morton Salt Co.*, 334 U. S. 37. But petitioner contends that a price differential does not become a "discrimination in price" under Section 2 (f) until it is shown that the discrimination makes, and that the buyer knew that it made, more than due allowance for differences in the seller's cost. This adds another element to a *prima facie* case against a buyer, so that two different definitions of discrimination

in price would result. If petitioner were correct, it would clearly be possible to have a discrimination in price violative of Section 2 (a), the knowing inducement of which would not violate Section 2 (f) unless and until an additional element consisting of lack of cost justification and the buyer's knowledge of that lack were affirmatively shown.

The language and history of Section 2 (f) demonstrate that it is but the complement of Section 2 (a), is directed at the same discriminations prohibited by Section 2 (a), and imposes equal liability upon the buyer when it is established that he knowingly induced or knowingly received the discrimination prohibited by Section 2 (a).

This Court's determination in the *Morton Salt* case, *supra*, at pages 44–45, of the relationship between the general prohibition of the statute and the provisos, is not limited to proceedings against sellers. The decision depended in the first instance on the ordinary rule of statutory construction that the burden of proving justification or exemption under a special exception generally rests on one who claims its benefits. Secondly, the court pointed to the procedural provision of Section 2 (b) that when a *prima facie* case of discrimination in price has been made out, the burden of justification "shall be upon the person charged with a violation of this section." Section 2 (f) is a part of "this section" and the elements of a *prima facie* case under Section 2 (a) are those to

viously stated. They do not include proof of lack of cost justification.

Petitioner attempts to escape the language of Section 2 (b) by asserting that the "person" referred to must be a seller charged with discrimination in price under Section 2 (a). This perverts the language of Section 2 (b) which says nothing about a *person charged with discrimination in price*. The exact language is: "Upon proof being made, at any hearing on *a complaint under this section, that there has been discrimination in price* * * * the burden of * * * showing justification shall be upon the person charged with a *violation of this section.*" [Emphasis supplied.] Here, in "a complaint under this section" (Section 2 (f)), the Commission has established a *prima facie* case of "discrimination in price." Hence the burden of justification is plainly placed on petitioner as "the person charged with a violation."

II

Petitioner argues that as construed below Section 2 (f) denies due process. Though stated differently, the argument has but two points: (1) that it was presumed that the price discriminations involved exceeded the cost differences, and based thereon, that petitioner had knowledge of that fact, (2) that proof of cost justification by a buyer is impossible.

The decisions below held that the burden of cost justification was on petitioner and was not

a part of the Commission's *prima facie* case. On this construction, no such presumptions were or could have been indulged against petitioner. The case is simply one of statutory construction. If a showing of lack of cost justification and petitioner's knowledge thereof were a necessary element of the Commission's case, as petitioner contends, then it proved no violation of Section 2 (f).

Petitioner's assertion of impossibility of proof is made in the face of its refusal to attempt to meet its statutory burden. This Court is being asked to hold, without any factual basis, that it would necessarily have been impossible for petitioner to show cost justification. Constitutional questions are not to be decided hypothetically. *Anniston Mfg. Co.* v. *Davis*, 301 U. S. 337, 352–353. Only if it could be said in advance of resort to it that statutory procedure is incapable of affording due process is there any legal excuse for failure to resort to it. *Yakus* v. *United States*, 321 U. S. 414, 435. Neither can it be assumed that the Commission would deny due process or deny such hearing as the Constitution prescribes. *Yakus* v. *United States, supra*, and cases cited.

Actually, proof of cost justification by petitioner was by no means impossible. The record affirmatively discloses that petitioner was not without information as to its sellers' costs. Petitioner refers to the numerous discriminations and sellers involved; as to this it could have moved

the Commission to elect a limited number of instances upon which it would rely. It speaks also of the intricacies of cost accounting. But if a lower price was in fact negotiated with the seller in good faith upon the basis of cost savings resulting from the "differing methods or quantities" in which the goods were "sold or delivered" to it, obviously the methods and quantities would have been identified, as well as the amounts of any resulting savings in cost. These facts could have been developed from the parties to the negotiations. Furthermore, in proceedings before the Commission involving cost accounting, if the other parties are willing to do so, it is normal to dispense with the production of records, substituting a check of the facts and data, produced at the hearings, by Commission accountants at the offices of the party who supplied them.

III

Petitioner complains that it was unduly prejudiced by refusal of the court below to remand the case to the Commission to permit petitioner to establish the impossibility of proving cost justification, and petitioner impliedly suggests this Court should order such a remand. Petitioner did move the court below for leave to adduce additional evidence, but not until the case had been decided against it. There were no reasonable grounds for the failure of petitioner to put in its

defense when the proceeding was before the Commission. Belief that the Commission had not made out a *prima facie* case or that the statute was unconstitutional is no excuse. The statutory provision respecting leave to adduce additional evidence is not to be abused by resort to it as a mere instrument of delay. *Southport Petroleum Company* v. *Labor Board*, 315 U. S. 100, 104. It was not an abuse of discretion for the court below to deny petitioner's motion.

ARGUMENT

I

THE COMMISSION AND THE COURT BELOW CORRECTLY CONSTRUED THE ACT

A. THE FINDINGS THAT PETITIONER KNOWINGLY INDUCED AND RECEIVED DISCRIMINATORY PRICES HAVING ADVERSE EFFECTS UPON COMPETITION ESTABLISHED PRIMA FACIE A VIOLATION OF SECTION 2 (f)

Petitioner contended in the court below that "Section 2 (a) * * * defines discriminations in price as 'differentials' which make more than 'due allowance for differences in the cost of manufacture, sale, or delivery * * *'" (Pet. Br. in Ct. of App., p. 14). The same basic view, though not so openly stated, pervades its position here. This is illustrated by the statement that what is prohibited to the buyer is the knowing inducement or receipt of "* * * a price differential which he knows makes more than 'due allowance' for differences in the seller's cost of manufacture, sale, or

delivery, *for not until this is shown does the differential become a 'discrimination in price which is prohibited by* this section.'" [Pet. Br., p. 28, emphasis supplied.] Upon this premise petitioner has built a major phase of its argument.[8]

Petitioner's argument simply ignores the fact that Section 2 (a) prohibits in general terms price discriminations which are likely to injure competition, and that while justification is permitted under the provisos of Section 2 (a), it is only as an exception to the general prohibition—the provisos do not otherwise modify, change, or alter that general prohibition.

Section 2 (f) of the Clayton Act, as amended by the Robinson-Patman Act (quoted *supra*, p. 4), makes it unlawful "knowingly to induce or receive a discrimination in price which is prohibited by this section." Inasmuch as Section 2 (a) is the only part of Section 2 which prohibits discriminations in price, it is clear that "prohibited by this section" in Section 2 (f) necessarily refers to discriminations prohibited by Section 2 (a). A *prima facie* case of violation of Section 2 (f), therefore, consists of a showing of the same elements which make a discrimination in price violative of Section 2 (a), plus the additional element of having induced or received such discrimination with knowledge of the facts which made it violative of Section 2 (a). The elements which make out a

[8] See also Pet. Br., pp. 29, 41, 45, 46, 54.

prima facie case of violation of Section 2 (a), aside from jurisdictional requirements, are a difference in price, on goods of like grade and quality, the effect of which may be injurious to competition. This Court so held in *Federal Trade Commission* v. *Morton Salt Company*, 334 U. S. 37, 45.[9]

As the Senate Committee observed,

> Section 2 (a) attacks directly the problem of discrimination in prices and terms of sale. Like present section 2 of the Clayton Act it contains a general prohibition against such discriminations, from which certain specified exceptions are then carved, thus throwing upon any who claim the benefit of those exceptions the burden of showing that their case falls within them.

S. Rep. No. 1502, 74th Cong., 2d Sess., p. 3;[10] see also H. Rep. No. 2287, 74th Cong., 2d Sess., p. 8. In short, under Section 2 (a) price discrimination between purchasers is *prima facie* unlawful if it has the requisite adverse effect on competition. While the statute permits certain exceptions to its general prohibition of price discriminations

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[9] To the same effect see *Corn Products Refining Company* v. *Federal Trade Commission*, 324 U. S. 726; *Federal Trade Commission* v. *A. E. Staley Mfg. Company*, 324 U. S. 746; *Standard Oil Company* v. *Federal Trade Commission*, 340 U. S. 231; *Federal Trade Commission* v. *Ruberoid Co.*, 343 U. S. 470.

[10] Section 2 (a) of the Senate bill, as reported, was substantially similar to 2 (a) as enacted. The Senate bill, as reported, however, contained no provisions comparable to Sections 2 (b) or 2 (f) of the Act.

likely to injure competition, one who claims the benefit of such an exception is seeking "justification or exemption under a special exception to the prohibitions of a statute." *Federal Trade Commission* v. *Morton Salt Co.*, 334 U. S. at 44.

Section 2 (f) differs from Section 2 (a) only in containing the express requirement that the buyer shall have "knowingly" induced or received such price discriminations. This requirement parallels the provision in Section 2 (a) that price discriminations are prohibited if they tend to "prevent competition with any person who either grants or *knowingly* receives the benefit of such discrimination." (Emphasis added.) With respect to the meaning of "knowingly" in Section 2 (a) the Conference Report states:

> The word "knowingly" appears in the Senate amendment immediately before the words "receives the benefit of such discrimination". The House conferees accepted this amendment. Its purpose is to exempt from the meaning of the surrounding clause those who incidentally receive discriminatory prices in the routine course of business without special solicitation, negotiation, or other arrangement for them on the part of the buyer or seller, and who are therefore not justly chargeable with knowledge that they are receiving the benefit of such discrimination. [House Report 2951, 74th Cong., 2d sess., pp. 5–6.]

While this explanation was not repeated in connection with Section 2 (f), the Conference Report

did mention other respects in which that section was intended to "harmonize with subsection (a)." *Id.*, p. 8. And no reason appears in the legislative history for attributing to the word "knowingly" a different connotation when it stands in Section 2 (f) from that which it bears in Section 2 (a).

These statements indicate that Congress regarded buyers who obtain discriminatory prices by special solicitation, negotiation, or other arrangement as standing in the same light as sellers who grant such prices. Under this construction the buyer would not be responsible for prices which he receives in the ordinary course of business, including quantity or other discounts under an open scale of prices, even though some of those prices may actually be unlawful discriminations, unless such discriminatory prices were the result of his own activities. The buyer is not made keeper of the seller's conscience—only his own. Responsibility attaches to the buyer only when through his own activities he obtains a special price which discriminates in his favor and against his competitors. It follows, therefore, that the buyer needs to concern himself only with those lower prices in the granting of which he plays a significant part.

That the Commission has so understood the legislative intent and adhered to it is apparent from an examination of the proceedings it has

brought under section 2 (f). Up to and including this case, the Commission has had eleven proceedings alleging violation of Section 2 (f),[11] in ten of which it issued orders to cease and desist. An examination of these proceedings will show that in each of them there was active inducement by the buyer of the lower prices obtained. It will also be observed that the proceedings fall into two general classes: (1) Those in which the buyer in obtaining the discriminatory price used some scheme which involved deception approaching, if not amounting to, fraud upon the sellers; (2) Those which represent a persistent and active use of size, prestige, or powerful connections by a buyer as a means of exacting discriminatory prices.

Thus in the Commission's view, a *prima facie* case is made out against a buyer if there are shown (a) the facts requisite to make out a *prima facie* case against the seller, i. e., price discrimination in the sale of goods of like grade and

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[11] *Bird & Son, Inc., et al.*, 25 F. T. C. 548; *Pittsburgh Plate Glass Company, et al.*, 25 F. T. C. 1228; *Golf Ball Manufacturers' Association, et al.*, 26 F. T. C. 824; *Miami Wholesale Drug Corporation, et al.*, 28 F. T. C. 485; *A. S. Aloe Company*, 34 F. T. C. 363; *American Oil Company and General Finance, Inc.*, 29 F. T. C. 857; *E. J. Branch & Sons*, 39 F. T. C. 535; *The Curtiss Candy Co.*, 44 F .T. C. 237, modified, 48 F. T. C. 161; *Atlantic City Wholesale Drug Company, et al.*, 38 F. T. C. 631; *Associated Merchandising Corporation, et al.*, 40 F. T. C. 578; *National Tea Company*, 46 F. T. C. 829, modified, 47 F. T. C. 1314.

quality in interstate commerce which adversely affects competition, and (b) that the buyer affirmatively contributed to obtaining the discriminatory prices by special solicitation, negotiation or other action taken by him. Since the Commission here found that petitioner had affirmatively, and indeed most vigorously "induced" the granting to it of discriminatory prices, which it knew to be discriminatory, *supra*, pp. 7–14, it properly concluded that a *prima facie* case had been made out against petitioner.[12]

Petitioner, however, argues for a construction of Section 2 (f) which would put the buyer who affirmatively solicits the granting to him of prices which he knows to be discriminatory in a more favorable position than the seller who merely yields to the buyer's inducements. It contends that the statute means one thing as to a seller and another as to a buyer. While claiming the benefit of the provisos to Section 2 (a), it insists that as applied in Section 2 (f) they should not be treated as provisos. (Br. p. 28.) And it argues further that the Commission must not only show that the discriminations were not cost-justified; it must prove what lay in the mind of the buyer who demanded them.

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[12] Petitioner's suggestion that it is guilty merely of "*receiving* a lower price", e. g., Brief, p. 29n, of course ignores the fact that it was the moving party in soliciting discriminations.

If petitioner's argument were correct, it would clearly be possible to have a discrimination in price prohibited by and violative of Section 2 (a), the knowing inducement of which would not violate Section 2 (f), because the Commission would not in the latter instance have shown that the price differential was not cost-justified, and that the buyer knew that fact. The anomaly is most clearly shown in a proceeding in which the seller and buyer were joined, the former being charged with granting certain discriminations in price in violation of Section 2 (a) and the latter with having knowingly induced and received the same discriminations in violation of Section 2 (f). Assume that in such a proceeding the Commission successfully established the existence of all the elements required under the *Morton Salt* case; that the buyer induced these discriminations in price knowing the presence of those elements; and that neither the seller nor the buyer made any defense. If petitioner were correct in its argument, then in the circumstances stated an order might issue against the seller but not against the buyer, because the Commission did not prove that the discriminatory price was not justified by costs.

Nothing in the legislative history affords any warrant for saying that the Act means one thing as to a buyer and another thing as to a seller. That history indicates rather that the buyer who actively induces a discriminatory price was re-

garded as on an equal footing with the seller who charges a discriminatory price.[13] Indeed, the bill was in very considerable part aimed at curbing the activities of large buyers who relied on their economic power to exact price concessions from sellers often much smaller than they. As this Court stated in *Federal Trade Commission* v. *Morton Salt Co.*, 334 U. S. 43:

> * * * The legislative history of the Robinson-Patman Act makes it abundantly clear that Congress considered it to be an evil that a large buyer could secure a competitive advantage over a small buyer

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[13] Congressman Utterback, in explaining the conference bill to the House, stated with reference to Section 2 (f):

> The closing paragraph of the Clayton Act amendment, for which section 1 of this bill provides, makes equally liable the person who knowingly induces or receives a discrimination in price prohibited by the amendment. * * *
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> * * * * * *
>
> This paragraph makes the buyer liable for knowingly inducing or receiving any discrimination in price which is unlawful under the first paragraph of the amendment. [80 Cong. Rec. 9419.]

Subsection (f) was introduced in substantially its present form as an amendment offered by Senator Copeland to the Robinson bill when that measure was before the Senate for consideration. No extended discussion was then had and the only significant statement made was that of Senator Robinson who said:

> This amendment makes the person who knowingly receives an unfair discriminatory price also liable; and I think it is sound in principle. [80 Cong. Rec. 6428.]

> solely because of the large buyer's quantity purchasing ability. The Robinson-Patman Act was passed to deprive a large buyer of such advantages except to the extent that a lower price could be justified by reason of a seller's diminished costs due to quantity manufacture, delivery or sale, or by reason of the seller's good faith effort to meet a competitor's equally low price.

The record in the present case reflects activities of a large buyer which clearly fall within the foregoing description.

B. SECTION 2 (b) PLAINLY CASTS THE BURDEN OF JUSTIFICATION UPON THE BUYER, ONCE SUCH A PRIMA FACIE CASE IS ESTABLISHED

Section 2 (b) specifically places upon the "person charged with a violation of this section" the burden of "rebutting the *prima-facie* case thus made by showing justification." Its terms permit no distinction between charges of violation of Section 2 (f) and of Section 2 (a). Whichever of those sections is invoked, the "person charged" bears the burden which section 2 (b) imposes.

This Court in *Federal Trade Commission* v. *Morton Salt Co.*, 334 U. S. 37, 44, 45 decided the relationship of the provisos of subsection (a) to the general prohibition of the statute, and the significance in that regard of the burden of proof imposed by subsection (b). Contrary to petitioner's argument (Pet. Br. p. 30) this Court did not rest its opinion on the ground that the pro-

ceeding was against sellers. It initially applied the general rule of statutory construction "that the burden of proving justification or exemption under a special exception to the prohibitions of a statute generally rests on one who claims its benefits," and in announcing that general rule referred to the authority of *Javierre* v. *Central Altagracia*, 217 U. S. 502, 507–508 and cases cited therein. The opinion of this Court in the *Morton Salt* case, 334 U. S. at pages 44, 45 states:

> First, the general rule of statutory construction that the burden of proving justification or exemption under a special exception to the prohibitions of a statute generally rests on one who claims its benefits;[14] requires that respondent undertake this proof under the proviso of § 2 (a). Secondly, § 2 (b) of the Act specifically imposes the burden of showing justification upon one who is shown to have discriminated in prices. And the Senate committee report on the bill explained that the provisos of § 2 (a) throw "upon any who claim the benefit of those exceptions the burden of showing that their case falls within them."[15] We think that the language of the Act, and the legislative history just cited, show that Congress meant by using the words "discrimination in price" in § 2 that in a case involving

[14] *Javierre* v. *Central Altagracia*, 217 U. S. 502, 507–508 and cases cited. [Court's footnote.]

[15] Sen. Rep. No. 1502, 74th Cong., 2d Sess. 3. See also 80 Cong. Rec. 3599, 8244, 9418. [Court's footnote.]

> competitive injury between a seller's customers the Commission need only prove that a seller had charged one purchaser a higher price for like goods than he had charged one or more of the purchaser's competitors.[16]

The Court also referred to Section 2 (b), which specifically places the burden of justification "upon the person charged with a violation of this section," as confirmatory of this rule. Petitioner, however, has argued (Pet. Br., pp. 31–36) that Section 2 (b) has no application to a buyer charged under Section 2 (f). That contention ignores the plain language of Section 2 (b), which makes no such distinction. But even if Section 2 (b) were not in the Act, petitioner's position would be no better. The legislative history of the procedural part of Section 2 (b) demonstrates that it is merely declaratory of the established rules as to the burden of proving statutory exceptions and intended to remove any possible doubt that such burden is to apply in Robinson-Patman Act proceedings before the Commission.[17] It simply makes definite and certain

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[16] See *Moss, Inc.*, v. *Federal Trade Commission*, 148 F. 2d 378, 379, holding that proof of a price differential in itself constituted "discrimination in price," where the competitive injury in question was between sellers. See also *Federal Trade Comm'n* v. *Cement Institute*, 333 U. S. 683, 721–726. [Court's footnote.]

[17] Congressman Utterback in explaining the Conference Report to the House explained the procedural part of Section 2 (b) as follows:

> Owing to a body of court decisions to the effect that the legal rules of evidence do not in certain respects

that the provisos of Sections 2 (a) and 2 (b) are not to be construed as matters constituting a part of the general prohibition of the statute.[18]

The procedural part of Section 2 (b) refers to "a complaint under this section," and Section 2 (f) is a part of "this section." It places the burden of justification upon "the person charged with a violation of this section." Petitioner contends that this language is without significance as to Section 2 (f) because that section was added after the framing of Section 2 (b).[19] Its contention necessarily rests upon an assumption that as additions are made to a bill in the legislative process, those who offer them and those who adopt them are unaware of the relationship of the new to the old and do not intend the result accomplished. Such a position is not

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apply to hearings before administrative commissions, and to the uncertainty thus suggested, the bill contains a subsection stating the rule as to burden of proof, substantially as suggested above, as applicable to hearings before the Federal Trade Commission. [80 Cong. Rec. 9418.]

[18] See, Austin *Price Discrimination and Related Problems Under the Robinson-Patman Act*, pp. 150–151.

[19] Contrary to petitioner's assertion (Apdx. Pet. Br., p. 63), section 2 (b) was not in the original House Bill, H. R. 8442. It was in the bill as reported with amendments to the Committee of the Whole House as Section (e). In the House Report (No. 2287, 74th Congress, 2d Sess., p. 16) it was stated: "Section (e) down to the proviso merely lays down directions with reference to procedure, including a statement with respect to burden of proof."

tenable. It also ignores the fact that section 2, in the form in which it was finally passed, had the consideration of a conference committee required to harmonize the differing provisions of the House and Senate bills, as well as the final action of the Congress.

When the three sections here involved are read together, the direction of the statute is plain. Section 2 (f) makes unlawful the knowing inducement or receipt of a discrimination in price prohibited by Section 2 (a). The discrimination in price prohibited by Section 2 (a) is that "between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, * * * and where the effect of such discrimination may be * * * to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them * * *" In terms, Section 2 (b) provides that when such a discrimination has been shown, the burden of justification[20] shall be upon "the person charged with a violation of this section."

Petitioner attempts to escape the language of Section 2 (b) by contending that "the 'person' referred to must be one charged with 'discrimination

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[20] "Justification," as used in Section 2 (b), refers to the defenses created by the provisos of Sections 2 (a) and 2 (b). *Standard Oil Company* v. *Federal Trade Commission*, 340 U. S. 231, 241.

in price" under 2 (a) * * *, i. e., the seller." (Pet. Br., pp. 31, 32). This perverts the language of Section 2 (b), which says nothing about a *person charged with discrimination in price.* The exact language is: "Upon proof being made, at any hearing on *a complaint under this section,* that there has been *discrimination in price* * * * the burden of * * * showing justification shall be upon the person charged with a *violation of this section.*" [Emphasis supplied.] Here, in "a complaint under this section" the Commission has shown a "discrimination in price." Hence the burden of justification is plainly placed on petitioner as "the person charged with a violation."

II

AS THUS CONSTRUED, SECTION 2 (f) IS NOT SUBJECT TO CONSTITUTIONAL ATTACK

Petitioner has argued at length (Pet. Br. 36–54) that Section 2 (f) as construed by the court below is unconstitutional because it entails a denial of due process. As presented, the argument is divided into three parts:

1. That there is "no rational connection" between the facts proved (price differences) and the facts presumed by the Commission and the court below; namely, price discriminations in excess of the seller's cost differences and the knowledge thereof on the part of the buyer (Pet. Br., pp. 37–44).

2. To require a buyer to justify price discriminations in effect creates a conclusive presumption and precludes the buyer from presenting its defense to the main fact presumed (Pet. Br., pp. 44–52).

3. The interpretation by the court below placing justification on the party charged results in an arbitrary classification (Pet. Br., pp. 52–54).

Though divided into three parts, the foregoing argument actually involves but two points: (1) that the decisions below rested upon presumptions of fact; and, (2) that it is impossible for a buyer to show cost justification. We shall attempt to show that neither argument has merit in the circumstances of this case. Because the argument is based on erroneous premises, the authorities cited by petitioner have no application here.

A. THE CONSTRUCTION BELOW RAISED NO PRESUMPTIONS

Petitioner's whole position on presumptions is epitomized in its statement (Pet. Br., p. 41):

> Obviously there is no rational connection in the instant case between the fact proved (price differences) and the facts presumed by the Commission and the court below, namely, price discrimination in *excess* of the seller's cost differences and *knowledge thereof* on the part of the buyer.
>
> Furthermore, in attempting to apply the *prima facie* provisions of the act to the

> buyer, the court below seeks to pyramid presumptions. It first presumes that the price differentials exceeded the cost differences. Based upon this first presumption it then presumes further or secondly that petitioner had knowledge of this fact. Presumptions cannot be pyramided. * * *.

But the fact is that the decisions of the Commission and the court below make certain beyond any doubt that no such presumptions were indulged.

Both the Commission and the court below held that a showing of an absence of cost justification, and petitioner's knowledge of that fact, were not a part of the Commission's *prima facie* case. The decisions were that the burden of showing cost justification was upon petitioner. In these circumstances the presumptions stated by petitioner do not, and can not, arise from the construction below.

Petitioner's argument wholly misapprehends the construction and effect of section 2. The statutory scheme is a general prohibition declaring unlawful *all* discriminations in price where the effect "may be" injurious to competition, but permitting "the person charged with a violation of this section" to justify an otherwise prohibited discrimination in price by showing that it comes within the terms of, and is thereby excused by, the provisos. If a showing of lack of cost justification and petitioner's knowledge

thereof were a necessary element of the statutory offense, as petitioner contends, then the Commission did not prove violation of Section 2 (f) by petitioner. The decisions below are, however, that such a showing is not an element of the offense, but a matter of justification. The decisions, in other words, are, not that the Commission had successfully negated justification by the use of presumptions, but that it was not required to negate justification at all. The case is simply one of statutory construction, and is not concerned with presumptions or the pyramiding of presumptions.

It will be observed that no fact which need be established under the terms of the provisos in order to show justification in any way rebuts or contradicts any element of a *prima facie* case under the general prohibition of the section. It follows, therefore, that the section establishes no presumptions, either rebuttable or conclusive. It simply permits an otherwise unlawful discrimination to be excused under the terms and conditions which Congress believed would contribute to the general purposes of the section, and places the burden of so justifying upon the person charged with violation.

The sole question, then, is whether placing this burden upon a buyer deprives him of due process, on the ground that it is impossible for a buyer to sustain his burden.

B. IT IS NOT SUFFICIENT MERELY TO ASSERT IMPOSSIBILITY OF PROOF

Petitioner did not plead justification nor make any effort whatever to prove it, but at the close of the Commission's case-in-chief simply moved to dismiss the complaint. The ground for this motion, as to Section 2 (f), was that Commission counsel did not show or attempt to show that the discriminations in price knowingly induced by petitioner made, to its knowledge, more than due allowance for the cost differences of the seller, and had therefore failed to establish a *prima facie* violation of the Act (R. 14). This motion was denied. Petitioner then stood upon its position that the Commission had not made out a case and petitioned the Court of Appeals to set aside the order issued.

The court below, having in mind that the claim of impossibility of proof rested solely upon petitioner's bare assertions, and was without any factual basis in the record to sustain it, held (R. 523):

> * * * It is not enough just to assert that proof is not available, or is impossible. *Tennessee Consolidated Coal Company* v. *Comm.*, 117 F. 2d 452. As the Court said in *Anniston Mfg. Co.* v. *Davis*, 301 U. S. 337, 352, 353, "Impossibility of proof may not be assumed. * * * Whether or not any such impossibility of determination will exist is a question which properly should await the ascertainment of the

> facts." And when petitioner chose not to introduce any evidence as to the facts it may not now say that the defense allowed by the Act is useless or impossible of proof. * * *

This view is in accord with the holding by this Court in *Yakus* v. *United States*, 321 U. S. 414, 435. There the petitioners had failed to seek the administrative remedy and statutory review which were open to them and had not shown that had they done so any of the consequences which they apprehended would have ensued. This Court said:

> * * * Only if we could say in advance of resort to the statutory procedure that it is incapable of affording due process to petitioners could we conclude that they have shown any legal excuse for their failure to resort to it or that their constitutional rights have been or will be infringed. *Natural Gas Co.* v. *Slattery*, 302 U. S. 300, 309; *Anniston Mfg. Co.* v. *Davis*, *supra*, 356–7; *Minnesota* v. *Probate Court*, *supra*, 275, 277.

The court below also stated (R. 523–524):

> * * * But we cannot say that it is unreasonable or arbitrary to expect a buyer who induces or knows that he is receiving prices substantially lower than his competitors to make some good faith efforts to ascertain that such lower prices are justified by lower costs in the sales to him.

> Nor can we assume that the Commission will be so arbitrary or unreasonable as to the quantum of proof required of the buyer in a proceeding under § 2 (f) as to deprive him of due process.

This also accords with the holding by this Court in *Yakus* v. *United States*, 321 U. S. at p. 434:

> * * * In the absence of any proceeding before the Administrator we cannot assume that he would fail in the performance of any duty imposed on him by the Constitution and laws of the United States, or that he would deny due process to petitioners by "loading the record against them" or denying such hearing as the Constitution prescribes. *Plymouth Coal Co.* v. *Pennsylvania*, 232 U. S. 531, 545; *Hall* v. *Geiger-Jones Co.*, 242 U. S. 539, 554; *Minnesota* v. *Probate Court*, 309 U. S. 270, 277, and cases cited.

It is apparent that petitioner is asking the Court to decide a constitutional question upon a hypothetical basis. This Court observed in *Anniston Mfg. Co.* v. *Davis*, 301 U. S. at p. 353, "Constitutional questions are not to be decided hypothetically. When particular facts control the decision they must be shown. *Borden's Farm Products Co.* v. *Baldwin*, 293 U. S. 194, 208–210."

C. JUSTIFICATION BY THE BUYER IS NOT IN FACT IMPOSSIBLE

As a matter of fact, even the assertions by petitioner of impossibility of proof of cost justi-

fication are without basis. If impossibility of proof actually existed, this would have appeared had petitioner made a good-faith effort to establish justification as permitted by the statute. But the record before the Court contains no factual basis for petitioner's assertions.

It may well be that petitioner was aware that if the facts were produced they would show that the discriminations in price which it knowingly induced were not cost-justified. There are sufficient facts now in the record concerning petitioner's relationships with some of its suppliers strongly to indicate, if not establish, that particular discriminations in price were not and under no circumstances could be justified on the basis of savings in cost.[21]

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[21] Petitioner's difficulty is suggested by instances wherein the price was fixed without reference to cost factors (see R. 69, 106–107, 252, 254); and the instances in which the price was apparently based in part on what petitioner paid others (R. 95, 241), or was intended to reflect the fact that petitioner's cost of doing business was higher than that of competitors (R. 91, 241). The difficulty is further suggested by the fact that at least one supplier found the price "rather difficult for us to explain" (R. 84); and others found the suggested savings limited (R. 195–197, 259) or non-existent (R. 188).

It may also be observed that while most suppliers mentioned savings in "selling costs", it appears that in some instances at least this merely reflected an allowance in lieu of brokerage (R. 362–363) which is specifically prohibited by Section 2(c). Price concessions made because petitioner was considered a good credit risk (R. 35, 72, 96, 234–235, 257, 299, 305) or because of the "distribution" afforded by its

In any event, the asserted impossibility of proof rests principally upon three grounds: one, the unavailability to petitioner of evidence as to its suppliers' costs; two, the large number of suppliers and discriminations involved; and, three, the intricacies and difficulties of distribution cost accounting. A further, but implied ground appears to be based upon an assumption that the Commission would be arbitrary and unreasonable in the nature and quantum of proof required and with respect to the manner of its production, including refusal of compulsory process for that purpose. Without attempting to say what the results might have been had petitioner made a good-faith attempt to put in its defense, it seems desirable at least to indicate some of the weaknesses in the position it has assumed.

(1). Both general knowledge and the evidence of the present record refute the assertion of unavailability to petitioner of evidence of its sellers' costs. Large buyers are not so naive. An example from the record in the present case will show this. From petitioner's correspondence with W. F. Schrafft & Sons Corporation (R. 387–400), it will be noted that petitioner claimed that certain items

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lessees (R. 54, 84, 149, 164, 243, 257, 277, 285–286, 305); or the advertising value of sales to it (R. 59, 164, 197, 231, 257, 277, 396) would not, as the record now stands, seem to have any relation to allowable savings under the cost-justification proviso.

of cost savings in definite amounts resulted from its methods of purchase and delivery (R. 389). The seller's reply (R. 391) furnished its appraisal of petitioner's claimed cost savings in relation to actual costs. Similar discussions of particular items of cost occurred during petitioner's oral negotiations with many other sellers. (See p. 40, fn. 21 *supra*).

Even if the seller had said nothing whatever about his costs, still petitioner would not have been helpless. An examination of the items of savings claimed by petitioner will show this. Within a narrow margin of possible error the costs of shipping containers and the difference in carton costs on 24-count and 100-count packages can be ascertained by the buyer. The free deals referred to were public knowledge in the trade, and their terms were readily available to petitioner. The amount of the returns, allowances, and samples might vary considerably among sellers, but knowledge of the general policy of the particular seller in this area would afford a reasonable guide. Freight costs are available through published tariffs. The extent of any savings in sales costs is the least available of any of these items, but general knowledge of the trade affords a basis for approximating this, if a margin for safety be allowed in the estimates.

It should also be observed that if a seller is willing to negotiate a lower price with a buyer based on cost savings, such negotiations can only be conducted on the basis of identified savings and their amounts. This process alone will inform the buyer of the seller's position on costs, and further develop the points at which doubt as to the amount of savings appears. If the negotiations represent an honest effort to arrive at actual savings, rather than an effort to exact the last penny or even more, regardless of consequences, buyers do not stand in the position petitioner claims.

(2). Undoubtedly, a large number of suppliers and discriminations in price appeared in the Commission's case-in-chief. If petitioner had actually been interested in attempting justification, it could have moved the Commission to elect a limited number of instances upon which it would rely, and thus greatly reduced the scope of the defense necessary. It did not do so. In this connection, it should be noted that, although no issue upon the point was before the Commission when it decided the case, in its unanimous opinion the Commission commented upon the number of suppliers and the quantity of proof that had been adduced, as follows (R. 498):

> * * * Records or summaries of records of the prices at which more than seventy-five such manufacturers sold their candy,

gum, nuts, and other confectionery products covering a period of ten years were obtained by subpoena and introduced into evidence. The Commission is concerned with enforcement of the laws administered by it through the medium of orders to cease and desist. Competent proof of one or more violations would, in ordinary circumstances, be sufficient to establish a factual basis for such an order. The record in this case does not disclose the reason for such a plethora of cumulative evidence as was adduced by government counsel in the instant matter. Neither harassment of litigants nor the waste of government funds in needless reiteration through cumulative evidence should be countenanced, nor does it seem that it was necessary to name fourteen sellers as typical of a group from which respondent had induced or received discriminations in price, and certainly the records of not more than five of such sellers would have supplied ample evidence of such discriminations or price differentials.

(3). With respect to the accounting problem, petitioner presents its argument upon the basis of a full-dress distribution cost accounting study of the entire business of a seller. If lower prices negotiated with a seller were in fact based upon cost differences, and both parties to the transaction acted as reasonable and prudent people would, then the proof of justification is much simpler.

The cost-justification proviso excepts differentials "* * * which make only due allowance for differences in the cost of manufacture, sale, or delivery *resulting from the differing methods or quantities* in which such commodities are to such purchasers *sold or delivered:* * * *" [Emphasis supplied.] Where a lower price has in fact been negotiated upon the basis of actual cost savings, obviously the differing methods or quantities would have been identified by the parties, as well as the amounts of any resulting savings. This would certainly be the case if the buyer were actually attempting in good faith to secure a reduction in price warranted by the methods or quantities in which he bought. Therefore, it should not be difficult to elicit through the testimony of the parties to the negotiation the items of savings which come within the terms of the proviso and which had been taken into account in arriving at the lower price. It should then be possible to develop, item by item, the facts supporting the savings believed to have been made.

In proceedings before the Commission involving cost accounting, if the parties concerned are willing to follow such procedure, it is normal to dispense with the production of records. In these instances the Commission checks, at the offices of the party who supplied the information, the facts and data which may be produced at the

hearing. Contrary to petitioner's suggestion (Pet. Br., pp. 47, 52), the Commission, in proper instances, regularly affords to parties respondent before it the use of compulsory process to assist them in putting in their defense.

In considering accounting data presented before the Commission in justification of price discriminations, reasonable allowance is necessarily made for the circumstances which may exist whenever a good-faith effort is being made by the party concerned. This is illustrated by the comment contained in the opinion of the Commission in its proceeding against the Minneapolis-Honeywell Regulator Company, 44 F. T. C. 351, 394:

> Cost studies of the sort presented in this matter ordinarily do not afford precise accuracy but must necessarily embrace a number of conjectural factors and allocations. There is inherent in them a reasonable margin of allowable error. Where they are made in good faith and in accordance with sound accounting principles, they should be given a very great weight. * * * respondent's effort represents a fair and objective study of the problem which was probably done as well as it could be done under the circumstances. Respondent's burden under the act is very great and it should have a liberal measure of consideration when it becomes apparent that it has made sincere and extensive ef-

> forts to discharge that burden. We have accordingly accepted the results of the cost study as fairly reflecting respondent's cost differentials within a reasonable margin of error.

In short, neither the present record nor facts of general knowledge support petitioner's assertion of impossibility of proof. There is no occasion here to determine the precise quantum of proof which might have been required of petitioner had it attempted to meet its statutory burden. It may be assumed that the Commission will require no greater degree of proof than is reasonable under the circumstances. And if, in a particular case, it should appear that the Commission had imposed a burden heavier than Congress intended or the Constitution permits, means of correction would certainly be available to a reviewing court. No such questions are presented here, however, since petitioner made no attempt whatever to show justification.

III

PETITIONER IS NOT ENTITLED TO TRY ITS CASE IN PIECEMEAL FASHION

Petitioner complains that it was unduly prejudiced because the court below refused to remand this case to the Commission, to permit petitioner to establish that it would be impossible for it to prove cost justification, and petitioner impliedly

suggests that this Court should order such a remand (Pet. Br., pp. 55–56). It is true that petitioner did move the court below for leave to adduce additional evidence,[22] but it waited until after the case had been decided against it before seeking this avenue of escape from the effect of an order.

Petitioner has been under no misapprehension as to the Commission's interpretation of Section 2 (f). Nevertheless, in the proceedings before the Commission it did nothing but insist on its own interpretation of the statute. It petitioned for review on the basis of that interpretation; and, after an adverse decision, asked for a rehearing still urging that interpretation. Then, almost as an afterthought, it moved for leave to adduce additional evidence, apparently not for the purpose of making a good faith attempt to show justification, but simply to show that "such proof is not available, or is impossible." (R. 534.)

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[22] Petitioner based its request on Section 11 of the Clayton Act (38 Stat. 734; 15 U. S. C. 21) the pertinent provision of which is:

> * * * If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the commission, authority, or board, the court may order such additional evidence to be taken before the commission, authority, or board and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. * * *

The court below was clearly correct in refusing (R. 537),

> * * * a new hearing on a new theory of defense after [petitioner] has had an adverse decision as to the theory originally relied upon in full and fair hearing before the Commission, and review of all issues raised on the record as made in that hearing.

It is plain that there were no reasonable grounds for failure even to try to produce evidence in defense when the proceeding was before the Commission. A belief that the Commission had not made out a prima facie case is not an excuse.[23] Neither is the belief that the statute was unconstitutional any excuse.[24] The statutory provision

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[23] *National Labor Relations Board* v. *Aluminum Products Co.*, 120 F. 2d 567, 573 (C. A. 7). *See also, Colorado Radio Corporation* v. *Federal Communications Commission*, 118 F. 2d 24, 26 (C. A. D. C.), in which the denial by the agency of a motion to submit additional evidence after final administrative action had been taken was sustained, the court saying:

> Appellant took its chance that the Commission, on the existing record, would revert to its previous decision although it had been set aside. Now that the decision has gone against it, the appellant wants a chance to persuade the Commission with a supplemental record. We cannot allow the appellant to sit back and hope that a decision will be in its favor, and then, when it isn't, to parry with an offer of more evidence. No judging process in any branch of government could operate efficiently or accurately if such a procedure were allowed.

[24] *National Labor Relations Board* v. *Anwelt Shoe Mfg. Co.*, 93 F. 2d 367, 372 (C. A. 1):

> The third alleged excuse for refusing to try the merits of the cases at the time the hearings were had or to avail

respecting leave to adduce additional evidence "in effect formulates a familiar principle regarding newly discovered evidence," *Labor Board* v. *Donnelly Company*, 330 U. S. 219, 234. As this Court observed in *Southport Petroleum Company* v. *Labor Board*, 315 U. S. 100, 104: "To ensure that [the petition] would be used only for proper purposes, and not abused by resort to it as a mere instrument of delay, Congress provided that before the court might grant relief thereunder it must be satisfied of the materiality of the additional evidence, and that there were reasonable grounds for failure to adduce it at the hearing before the Board." [25]

The motion was addressed to the discretion of the court. Clearly petitioner was unable to and did not bring its request within the terms of the statute. To have granted the motion in the circumstances of this case would have established a rule, different from that heretofore applied,

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themselves of an opportunity to put in evidence later before the Board, at some reasonable time to be fixed for so doing, is an alleged belief of the respondents and their attorney that the act was unconstitutional. If every respondent charged with the violation of a federal act could be allowed to set up, as a reason for refusing to try his case when brought on for hearing, that the act, in his judgment, was unconstitutional, little progress could be made in the orderly trial of such causes.

[25] The provisions of the National Labor Relations Act being construed were in substance identical with the provisions of Section 11 of the Clayton Act, sought to be invoked by petitioner.

and one which would create innumerable opportunities for delaying the adjudication of proceedings of this type.

IV

PETITIONER'S PREDICTIONS OF THE DESTRUCTION OF COMPETITION ARE UNWARRANTED

It appears to us that petitioner, having conducted its purchasing operations in disregard of the law, now attempts to save itself by asserting that, if enforced, the law will destroy price competition. Petitioner's brief is interlarded throughout with various statements to the effect that bargaining between sellers and buyers would be impossible, that buyers will fear to purchase except at the highest price, and that effective price competition will disappear. If petitioner means competition based upon price discriminations having no cost or other economic justification, it is correct; but as to price competition not so based, its contentions are reached upon erroneous assumptions. Although petitioner's contentions in this regard are more properly addressed to Congress than to the Court, we believe it appropriate to point out that the impact of the Act, as construed below, is far less drastic than petitioner asserts it to be.

There is no doubt that Congress intended to prevent large buyers from obtaining a competitive advantage over small buyers merely because

of their size and purchasing power. It is also plain that in doing this, there was no intention to interfere with routine business transactions. To strike a balance conforming to these broad purposes Congress limited the application of Section 2 (f) to prohibited discriminations "knowingly" obtained. The legislative history ascribes to the word "knowingly" the connotation of discriminatory prices resulting from special solicitation, negotiation, or other arrangement. Under this construction the buyer would not be responsible for prices which are received in the ordinary course of business, including quantity or other discounts under an open scale of prices, even though some of those prices may actually be unlawful discriminations, unless such discriminatory prices were the result of his own activities.

In addition, the statute and its legislative history make it clear that Congress intended that a seller might grant and a buyer might receive a discriminatory price, if the price made no more than due allowance for savings in cost to the seller resulting from the quantities or methods of sale and delivery. And, as we have pointed out (*supra*, p. 45), where the buyer in good faith has sought only such prices as can be so justified, he will be in a position to establish justification.

The type of transaction to which Section 2 (f) applies is thus limited to special prices which result from the activities of the buyer and which

cannot be justified by costs. Its area of practical application in the field of business as a whole is also limited. It is common knowledge that generally in businesses involving sales by producers to buyers who are engaged in the further distribution of the products purchased; the small and ordinary buyer is in no position to and does not obtain special prices. He is but one of a large group of customers and his trade is not important enough to the producer to enable him to secure special treatment. In fact, in the case of well-known products having wide consumer acceptance—as is the case with a tremendous volume of consumer goods—he is frequently an applicant for an opportunity to purchase rather than an applicant for special prices. It is only the larger buyer, whose individual business is of real importance to the seller, that occupies a bargaining position enabling him to secure special treatment. The number of large buyers is relatively small, and once lost as a customer such a buyer may not be readily replaced. Individually, such buyers therefore occupy a different position with a seller than does the ordinary customer.

Section 2 (a) of the statute clearly informs the seller that discriminations in price which may injure competition are unlawful, and if he grants such discriminations without ascertaining whether he has legal justification, he is not heard

to complain if he later finds himself unable successfully to justify them. Congress determined the public policy which forbids discriminations the effect of which "may be" injurious to competition, and provided the nature and limit of the justifications that might be made. These are based upon economic and competitive considerations. Section 2 (f) applies the same principle to buyers. Both buyer and seller know that special prices which may injuriously affect competition involve a risk of statutory violation to each of them, and they have an obligation to act in a prudent manner. Thus, in those instances where a buyer's own actions contribute to obtaining for himself a special and discriminatory price, he should accept responsibility for his actions if the price is not cost justified and adverse effects upon competition follow.

All these factors indicate the practical area of application of Section 2 (f); that the parties affected are not without means of protecting themselves; and that Section 2 (f) does not prevent large buyers from obtaining in the form of a lower price the benefit of savings they can make for the seller. Section 2 (f) does no more than Congress intended—aid in restoring equality of opportunity in business by preventing large buyers from recklessly using their size, power, and position to exact sacrificial price discriminations that are without economic justification.

CONCLUSION

For the foregoing reasons, the judgment of the court below should be affirmed except as to the order of enforcement. As to that order it should be reversed.

Respectfully submitted.

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